

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

VICTOR DANIEL SOLTERO,

Plaintiff,

v.

JOE McGRATH, Director, Department
of Corrections; RODERICK Q.
HICKMAN; J. CELAYA; M. ATCHLEY;
E. GARCIA; R. SALGADO; C. BEVINS;
B. CHAVEZ; D. MORENO; L.
FLOWERS; P. LOPEZ; R. BRIONES; D.
SMETHERS; R. LAPURGA; JONES; V.
SOLIS; J. STEVENSON; R. MOTT; M.
NILSSON, M. S. EVANS, Warden,
Salinas Valley State Prison; G.
PONDERS; and J. RUELAS,

Defendants.

No. C 07-4256 PJH (PR)

**ORDER DENYING MOTION
FOR SUMMARY JUDGMENT,
STAYING CASE, AND
REFERRING CASE FOR
SETTLEMENT CONFERENCE**

This is a civil rights case filed pro se by a state prisoner. The only remaining claim is that defendant Ruelas "sucker punched" plaintiff in the back of the head while he was in full restraints. Ruelas has filed a motion for summary judgment. Plaintiff has opposed the motion, and defendant has replied.

For the reasons set out below, the motion for summary judgment will be denied. The case will be stayed and referred to the prisoner mediation program to explore the possibility of settlement.

BACKGROUND

The complaint was dismissed with leave to amend in the initial review order. Plaintiff amended, adding eighteen new defendants and expanding the "Statement of Claim" portion of the complaint from four pages to twenty-one. The court carefully reviewed the amended

1 complaint, concluding that one claim, that defendant Ruelas "sucker punched" him in the
2 back of the head while he was seated in full restraints, was sufficient to state a claim, and
3 that all the other claims were not. Many claims were dismissed without further leave to
4 amend, and some were dismissed with leave to amend within thirty days. When plaintiff
5 did not amend, the court ordered service of the only remaining claim, that Ruelas "sucker
6 punched" plaintiff.

7 DISCUSSION

8 The only remaining claim in this case is that Ruelas "sucker punched" plaintiff, that
9 is, hit him in the back of the head without warning and while he was restrained. Ruelas
10 contends that he is entitled to summary judgment because (1) the force he used in
11 subduing plaintiff was appropriate in the circumstances;(2) he did not "sucker punch"
12 plaintiff; and (3) he is entitled to qualified immunity. Because the only claim remaining in
13 this case is the one arising from the "sucker punch," the first argument is irrelevant and will
14 not be discussed further.

15 I. Summary Judgment Standard

16 Summary judgment is proper where the pleadings, discovery and affidavits show
17 that there is "no genuine issue as to any material fact and that the moving party is entitled
18 to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may
19 affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
20 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury
21 to return a verdict for the nonmoving party. *Id.*

22 The moving party for summary judgment bears the initial burden of identifying those
23 portions of the pleadings, discovery and affidavits which demonstrate the absence of a
24 genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986); *Nissan*
25 *Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the moving
26 party has met this burden of production, the nonmoving party must go beyond the
27 pleadings and, by its own affidavits or discovery, set forth specific facts showing that there
28 is a genuine issue for trial. If the nonmoving party fails to produce enough evidence to

1 show a genuine issue of material fact, the moving party wins. *Id.*

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3 **II. Excessive Force**

4 **A. Standard**

5 "After incarceration, only the unnecessary and wanton infliction of pain . . .
6 constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v.*
7 *Albers*, 475 U.S. 312, 319 (1986) (ellipsis in original) (internal quotation and citation
8 omitted). Whenever prison officials stand accused of using excessive force in violation of
9 the Eighth Amendment, the core judicial inquiry is whether force was applied in a good-faith
10 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.
11 *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *Whitley*, 475 U.S. at 320-21. In determining
12 whether the use of force was for the purpose of maintaining or restoring discipline, or for
13 the malicious and sadistic purpose of causing harm, a court may evaluate the need for
14 application of force, the relationship between that need and the amount of force used, the
15 extent of any injury inflicted, the threat reasonably perceived by the responsible officials,
16 and any efforts made to temper the severity of a forceful response. *Hudson*, 503 U.S. at 7.

17 **B. Analysis**

18 It is undisputed that (1) on October 2, 2006, a mass cell search was conducted in
19 the building in which plaintiff was housed at Salinas Valley State Prison; (2) plaintiff and
20 several other prisoners who had been removed from their cells were seated in restraints on
21 benches in the day room under the supervision of Ruelas; (3) an alarm was sounded as a
22 result of a disturbance elsewhere; (4) as a consequence of the alarm Ruelas began moving
23 the inmates under his supervision to prone positions on the ground; (5) plaintiff resisted this
24 and had to be wrestled to the ground by Ruelas and another guard. Plaintiff contends that
25 it was immediately after these events, while he was restrained and subdued, that Ruelas
26 "sucker-punched" him in the back of the head. Ruelas denies it.

27 The question, then, is whether there is genuine issue of material fact as to whether
28 Ruelas actually sucker-punched plaintiff after he had been subdued and while he was in full

1 restraints. Ruelas says he did not. Decl. Ruelas ¶ 10. Plaintiff says he did. Decl. Soltero
2 ¶ 1. Unless there is some reason to discount one or the other of the declarations, these
3 declarations clearly are contrary to each other and thus establish that there is in this case a
4 genuine issue of fact.

5 Ruelas does, in fact, contend that plaintiff's contention that he was "sucker punched"
6 should be discounted: he says it is "conclusory." Reply at 3, 5; see *Rodriguez v. Airborne*
7 *Express*, 265 F.3d 890, 902 (9th Cir. 2001) ("self-serving affidavits are cognizable to
8 establish a genuine issue of material fact so long as they state facts based on personal
9 knowledge and are not too conclusory."). But plaintiff has alleged that he was in restraints,
10 Decl. Soltero ¶ 1; that the blow was after he had been subdued, *id.*; that he was hit in the
11 back of the head, *id.*; and that he sustained injuries, *id.* at ¶ 5. What more could plaintiff
12 say about an unexpected punch from behind, assuming that the punch occurred, other than
13 what he has? Plaintiff's statements are not conclusory, and thus are sufficient to generate
14 a genuine issue of fact.

15 As to whether the genuine issue is material, material facts are those which may
16 affect the outcome of the case. See *Liberty Lobby*, 477 U.S. at 248. *Hudson* set out the
17 factors for deciding whether a guard's action was malicious and sadistic and thus an Eighth
18 Amendment violation. *Hudson*, 503 U.S. at 7. Applying those factors here, if the facts are
19 as plaintiff claims: (1) there would have been no need for application of force; (2) there
20 would be no relationship between that need and the amount of force used, because there
21 would have been no need; (3) the swelling and bruising of plaintiff's head arguably would
22 be more than de minimis; (4) there could have been no threat perceived by Ruelas, as
23 plaintiff was in restraints and had been subdued; and (5) no efforts appear to have been
24 made to temper the severity of the action. Thus it is decisive for the outcome of the case
25 whether plaintiff's version of the facts is correct or Ruelas' version is. The dispute over
26 whether Ruelas actually "sucker punched" plaintiff is material.

27 Because there is a genuine issue of material fact, Ruelas is not entitled to summary
28 judgment on this contention, that is, there is a genuine issue of material fact whether there

1 was an Eighth Amendment violation.¹

2 II. Qualified Immunity

3 Because summary judgment must be denied on Ruelas' contention that he did not
4 violate plaintiff's rights, the court must reach his qualified immunity contention.

5 The defense of qualified immunity protects "government officials . . . from liability for
6 civil damages insofar as their conduct does not violate clearly established statutory or
7 constitutional rights of which a reasonable person would have known." *Harlow v.*
8 *Fitzgerald*, 457 U.S. 800, 818 (1982). A court considering a claim of qualified immunity
9 must determine (1) whether the plaintiff has alleged the deprivation of an actual
10 constitutional right and (2) whether such right was clearly established such that it would be
11 clear to a reasonable officer that his conduct was unlawful in the situation he confronted.
12 *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (overruling requirement in *Saucier v. Katz*,
13 533 U.S. 194 (2001), that court ruling on qualified immunity claim consider first prong of
14 test before addressing second prong). The court may exercise its discretion in deciding
15 which prong to address first. *Id.*

16 Plaintiff has adequately alleged violation of a constitutional right, and a reasonable
17 person in Ruelas' position would not have believed that it was lawful to hit a restrained
18 prisoner in the head without cause. The qualified immunity claim is without merit.

19 CONCLUSION

20 1. For the foregoing reasons, the motion for summary judgment (document number
21 43 on the docket) is **DENIED**.

22 2. Plaintiff's motion for an extension of time to file an opposition (document 53) is

23
24 ¹ Plaintiff says that his head was bruised and swollen as a result of the blow and that
25 he suffered a headache. Amen. Pet. (verified) at 3-1, 3-9; Decl. Soltero ¶ 8. That the injuries
26 were relatively minor does not defeat an excessive force claim; it is the excessiveness of the
27 force used, not the amount of injury, that matters. See *Wilkins v. Gaddy*, 130 S. Ct. 1175,
28 1178-79 (2010) (inmate who is gratuitously beaten by guards does not lose his ability to pursue
an excessive force claim merely because he has the good fortune to escape without serious
injury); *Watts v. McKinney*, 394 F.3d 710, 712-13 (9th Cir. 2005) (kicking genitals of prisoner
who was on ground and in handcuffs "near the top of the list" of acts taken with cruel and
sadistic purpose to harm another). As was the case in *Wilkins*, however, "the relatively
modest nature of [plaintiff's] alleged injuries will no doubt limit the damages he may recover."
Wilkins, 130 S.Ct. at 1180.

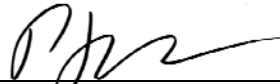
1 **GRANTED.** The opposition is deemed timely. His motion to compel (document 59) is
2 **DENIED** without prejudice to renewing it if the case does not settle.

3 3. The court has established a Pro Se Prisoner Mediation Program in which certain
4 prisoner civil rights cases are referred to a neutral magistrate judge for mediation. This
5 case is referred to Magistrate Judge Nandor Vadas for mediation. Magistrate Judge Vadas
6 shall conduct mediation proceedings as he deems appropriate and file a report thereafter.

7 4. In view of the referral, further proceedings in this case are **STAYED** until such
8 time as Judge Vadas reports that the case has been settled or cannot be settled. If the
9 case is not settled, the court will enter a new scheduling order. The clerk shall mail a copy
10 of the file, including this order, to Magistrate Judge Vadas.

11 **IT IS SO ORDERED.**

12 Dated: September 20, 2010.



PHYLLIS J. HAMILTON
United States District Judge

United States District Court
For the Northern District of California

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